(2)

Supreme Court, U.S.
FILED
FEB 12 2007
OFFICE OF THE CLERK

No. 06-806

# In the Supreme Court of the United States

CONSOLIDATION COAL COMPANY, PETITIONER

*v.*

BILLY D. WILLIAMS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
*Solicitor General*
*Counsel of Record*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

JONATHAN L. SNARE
*Acting Solicitor of Labor*

NATHANIEL I. SPILLER
*Assistant Deputy Solicitor*

EDWARD D. SIEGER
*Attorney*
*Department of Labor*
*Washington, D.C. 20210*

BEST AVAILABLE COPY

## QUESTION PRESENTED

The Black Lung Benefits Act provides that "[a]ny claim for benefits by a miner * * * shall be filed within three years after * * * a medical determination of total disability due to pneumoconiosis." 30 U.S.C. 932(f)(1). The question presented is whether, in a subsequent claim for benefits under the Act, the statute of limitations is triggered by a medical diagnosis that pre-dates a prior denial of such benefits.

## TABLE OF CONTENTS


Page

Opinions below ..... 1
Jurisdiction ..... 1
Statement ..... 2
Argument ..... 6
Conclusion ..... 10
Appendix ..... 1a


## TABLE OF AUTHORITIES

Cases:


*Island Creek Coal Co.* v. *Henline*, 456 F.3d 421 (4th Cir. 2006) ..... 8, 9

*Labelle Processing Co.* v. *Swarrow*, 72 F.3d 308 (3d Cir. 1995) ..... 7

*Lisa Lee Mines* v. *Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996), cert. denied, 519 U.S. 1090 (1997) ..... 5, 7, 9

*Lovilia Coal Co.* v. *Harvey*, 109 F.3d 445 (8th Cir. 1997), cert. denied, 523 U.S. 1059 (1998) ..... 7

*Midland Coal Co.* v. *Director, OWCP*, 358 F.3d 486 (7th Cir. 2004) ..... 6

*Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135 (1987) ..... 2

*Peabody Coal Co.* v. *Director, OWCP*, 48 Fed. Appx. 140 (6th Cir. 2002) ..... 9

*Peabody Coal Co.* v. *Spese*, 117 F.3d 1001 (7th Cir. 1997) ..... 7

*Sharondale Corp.* v. *Ross*, 42 F.3d 993 (6th Cir. 1994) ..... 7

*Tennessee Consol. Coal Co.* v. *Kirk*, 264 F.3d 602 (6th Cir. 2001) ..... 8

Cases—Continued: Page

*Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) ..... 2
*Wisniewski* v. *United States*, 353 U.S. 901 (1957) ..... 8
*Wyoming Fuel Co.* v. *Director, OWCP*, 90 F.3d 1502 (10th Cir. 1996) ..... 4, 7, 8

Statutes and regulations:

Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*:
30 U.S.C. 901(a) ..... 2
30 U.S.C. 921(b) ..... 4
30 U.S.C. 932(f)(1) ..... 2, 3, 6
30 U.S.C. 936(a) ..... 2
20 C.F.R :
Section 718.201(c) ..... 2
Section 725.202(d) ..... 2
Section 725.308 ..... 2
Section 725.309(d) ..... 2, 7
Section 725.351 ..... 3
Sections 725.401-725.420 ..... 3
Section 725.421(a) ..... 3
Section 725.481 ..... 4
Section 801.102(a)(6) ..... 4

# In the Supreme Court of the United States

No. 06-806

CONSOLIDATION COAL COMPANY, PETITIONER

v.

BILLY D. WILLIAMS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

**BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-29a) is reported at 453 F.3d 609. The decisions and orders of the Benefits Review Board (Pet. App. 30a-56a) and administrative law judge (Pet. App. 57a-80a) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on July 13, 2006. A petition for rehearing was denied on September 8, 2006 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on December 6, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Black Lung Benefits Act (the Act) provides compensation "to coal miners who are totally disabled due to pneumoconiosis." 30 U.S.C. 901(a). A miner seeking disability benefits must establish that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that pneumoconiosis contributes to the total disability. 20 C.F.R. 725.202(d). Pneumoconiosis is a latent and progressive disease; its symptoms may appear and worsen gradually. See *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 139, 151 (1987); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 7-8 (1976); 20 C.F.R. 718.201(c). The Secretary of Labor, who is responsible for administering the Act, 30 U.S.C. 936(a), therefore has promulgated rules allowing miners to make a subsequent claim at least one year after the denial of a prior claim for black lung benefits. 20 C.F.R. 725.309(d). To preserve the finality of the prior determination, a subsequent claim will be denied unless "the claimant demonstrates that one of the applicable conditions of entitlement," upon which the prior denial was based, "has changed since * * * the order denying the prior claim became final." *Ibid.* At issue in this case is the application of the Act's statute of limitations to subsequent claims. The Act provides that "[a]ny claim for benefits by a miner under this section shall be filed within three years after * * * a medical determination of total disability due to pneumoconiosis." 30 U.S.C. 932(f)(1); see 20 C.F.R. 725.308 (adding requirement that medical determination be "communicated to the miner").

2. Respondent Billy D. Williams worked as a coal miner for at least 30 years, and worked for petitioner

Consolidation Coal Co. from 1957 until he retired in 1987. Pet. App. 4a, 59a. In July 1995, Williams filed a claim for black lung benefits with the Department of Labor's Office of Workers' Compensation Programs (OWCP), which makes initial determinations on such claims. *Id.* at 4a; see 20 C.F.R. 725.351, 725.401-725.420. In November 1995, Williams received a letter from Dr. Jerome J. Lebovitz, which stated that Williams "was permanently and totally disabled secondary to the entity of Coal Worker's Pneumoconiosis." Pet. App. 4a (internal quotation marks omitted); see *id.* at 32a n.1; App., *infra*, 2a. OWCP denied Williams's claim in January 1996 on the ground that Williams failed to establish that he had pneumoconiosis and that he was totally disabled as a result of pneumoconiosis. Pet. App. 4a, 32a n.1, 71a.[1]

In June 2001, Williams filed a second claim for benefits. Pet. App. 4a, 31a-32a, 61a. In 2002, OWCP found Williams entitled to benefits, and petitioner requested a hearing before an administrative law judge (ALJ). *Id.* at 32a; see 20 C.F.R. 725.421(a) (providing for ALJ adjudication of contested cases). Petitioner filed a motion to dismiss the second claim on the ground that it was barred by the Act's three-year statute of limitations, which commences upon "a medical determination of total disability due to pneumoconiosis." 30 U.S.C. 932(f)(1). Petitioner contended that the limitations period began with the November 1995 letter from Dr. Lebovitz, and

---

[1] The 1996 denial was based largely on the results of an OWCP-ordered physical examination of Williams, which was carried out by Dr. Andrzej J. Jaworski. Pet. App. 4a, 32a n.1. The Benefits Review Board in this case concluded that the Lebovitz letter referred to above was not in the record before OWCP. *Ibid.*

that Williams could not bring his claim almost six years later. Pet. App. 4a; see *id.* at 32a n.1, 65a.

3. a. The ALJ denied petitioner's motion to dismiss. App., *infra*, 1a-4a. In accordance with *Wyoming Fuel Co.* v. *Director, OWCP*, 90 F.3d 1502 (10th Cir. 1996), the ALJ found that the 1996 denial of Williams's claim repudiated Dr. Lebovitz's November 1995 diagnosis of totally disabling pneumoconiosis and "nullified" that determination's "ability to trigger the statute of limitations." App., *infra*, 2a. The ALJ also took "official notice" of the fact that the 1995 medical determination was "unreasoned and undocumented and would almost certainly not have changed the Department of Labor's disposition of the [1995] claim." *Id.* at 3a.

In a later decision on the merits, the ALJ denied petitioner's renewed motion to dismiss for the same reasons. Pet. App. 69a-70a. Based on a review of all the medical evidence submitted after Williams filed his second claim, the ALJ concluded that Williams had established a change in his medical condition and was now totally disabled by pneumoconiosis. *Id.* at 70a-80a.[2]

b. The Benefits Review Board affirmed the ALJ's decision. Pet. App. 30a-56a; see 30 U.S.C. 921(b) (Board reviews ALJ decisions); 20 C.F.R. 725.481, 801.102(a)(6) (same). The Board agreed with the ALJ that Dr. Lebovitz's November 1995 report did not trigger the three-year statute of limitations. Pet. App. 40a. The Board also upheld the ALJ's award of benefits on the merits. *Id.* at 51a-54a.

---

[2] The ALJ also ruled against petitioner on a number of evidentiary issues and refused to disqualify himself for alleged bias. Pet. App. 66a-70a. The Benefits Review Board affirmed the ALJ's rulings on those issues, *id.* at 41a-51a, and the court of appeals affirmed, *id.* at 19a-26a. Petitioner does not seek review of those rulings.

4. The court of appeals denied the petition for review of the Board's decision. Pet. App. 3a-29a. On the statute of limitations issue, the court held that Dr. Lebovitz's November 1995 report did not trigger the three-year statute of limitations on Williams's June 2001 subsequent claim. *Id.* at 11a-19a. Citing its holding in *Lisa Lee Mines* v. *Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996) (en banc), cert. denied, 519 U.S. 1090 (1997), the court of appeals held that the prior denial of Williams's claim for black lung benefits had to be accepted as a final and correct determination that Williams was not totally disabled by pneumoconiosis on the date of the denial. Pet. App. 13a-14a. The court therefore treated the 1995 physician's report, "for legal purposes, as a misdiagnosis in light of the denial of Williams's first claim." *Id.* at 14a. Because the report "related solely to Williams's condition in *1995*, [it] could not have sustained a subsequent claim that his condition had materially worsened since the initial denial of benefits in *1996*." *Id.* at 17a-18a (emphasis in original). The court therefore concluded that the 1995 report was legally irrelevant to Williams's subsequent claim, and could not trigger the statute of limitations for that claim. *Id.* at 14a, 18a.

The court further explained that its decision was consistent with the Black Lung Benefits Act in three respects. First, the court reasoned that the latent and progressive nature of pneumoconiosis required that a claimant should be free to reapply for benefits if his first filing was premature. Pet. App. 15a-16a. Second, the requirement that a miner prove a material change in conditions on a subsequent claim showed, in the court's view, that "[i]t would be illogical and inequitable to hold that a diagnosis that could not sustain a subsequent

claim could nevertheless trigger the statute of limitations for such a claim." *Id.* at 18a. Finally, the court concluded that allowing a misdiagnosis to bar a future claim could defeat the statute's purpose by making miners reluctant to seek medical advice in the early stages of pneumoconiosis. *Ibid.*

## ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

Petitioner argues (Pet. 7-13) that the statute of limitations in the Black Lung Benefits Act begins running for *all* claims upon communication to the miner of the *first* medical diagnosis of totally disabling pneumoconiosis. But the statute provides that "*[a]ny* claim for benefits by a miner under this section shall be filed within three years after * * * *a* medical determination of total disability due to pneumoconiosis." 30 U.S.C. 932(f)(1) (emphasis added). Petitioner's interpretation requires the addition of limiting language to the plain terms of the statute.

The statute of limitations nevertheless may be ambiguous as applied to the particular facts of this case because it does not specify *which* medical determination triggers the limitations period when, as here, there has been an intervening denial of benefits. Petitioner's proposed application of the statute of limitations in those circumstances, however, conflicts with the "special preclusion rules that apply in this area." *Midland Coal Co.* v. *Director, OWCP*, 358 F.3d 486, 489 (7th Cir. 2004). Because pneumoconiosis is a latent and progressive disease, the Director's regulations—which petitioner does

not challenge—allow a miner to file a subsequent claim if his first claim was premature. 20 C.F.R. 725.309(d). As the Fourth Circuit has noted, "[a] new black lung claim is not barred, as a matter of ordinary *res judicata*, by an earlier denial, because the claims are not the same. * * * [R]es judicata does not apply if the issue is claimant's physical condition or degree of disability at two entirely different times." *Lisa Lee Mines* v. *Director, OWCP*, 86 F.3d 1358, 1362 (1996) (en banc), cert. denied, 519 U.S. 1090 (1997). That is so because "[t]he health of a human being is not susceptible to once-in-a-lifetime adjudication." *Ibid.*

To conform serial black lung claims to traditional principles of issue and claim preclusion, however, those courts of appeals which have considered the problem have unanimously held that a prior denial of benefits must be "presumed to have been correct when made and to continue to be correct through time." *Lisa Lee Mines*, 86 F.3d at 1363. See *Peabody Coal Co.* v. *Spese*, 117 F.3d 1001, 1008-1009 (7th Cir. 1997) (en banc); *Lovilia Coal Co.* v. *Harvey*, 109 F.3d 445, 453-454 (8th Cir. 1997), cert. denied, 523 U.S. 1059 (1998); *Wyoming Fuel Co.* v. *Director, OWCP*, 90 F.3d 1502, 1508-1509 (10th Cir. 1996); *Labelle Processing Co.* v. *Swarrow*, 72 F.3d 308, 313-314 (3d Cir. 1995); *Sharondale Corp.* v. *Ross*, 42 F.3d 993, 998-999 (6th Cir. 1994). A subsequent claimant therefore is "precluded from collaterally attacking the prior denial of benefits," but he "may file a new claim, asserting that he is *now* eligible for benefits because he has become totally disabled due to coal miner's pneumoconiosis and that his disability occurred subsequent to the prior adjudication." *Labelle Processing*, 72 F.3d at 314. The Director's regulations codify that understanding. See 20 C.F.R. 725.309(d) ("A subse-

quent claim * * * shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement * * * has changed since the date upon which the order denying the prior claim became final.").

These principles govern the timeliness of subsequent black lung benefit claims no less than the merits of such claims. The rejection of a prior claim on the ground that the claimant was not totally disabled by pneumoconiosis must be treated as correct and final with respect to that issue at that time. The court of appeals correctly noted in this case that the denial of Williams's 1996 claim rendered his 1995 diagnosis a legal nullity—a "misdiagnosis" that had "no effect on the statute of limitations for [Williams's] second claim." Pet. App. 14a.[3] The Tenth Circuit reached a similar result in *Wyoming Fuel*, *supra*. In that case, the court held that "a final finding by an Office of Workers' Compensation Program adjudicator that the claimant is not totally disabled due to pneumoconiosis repudiates any earlier medical determination to the contrary and renders prior medical advice to the contrary ineffective to trigger the running of the statute of limitations." 90 F.3d at 1507.

Petitioner argues (Pet. 6) that the law of the Sixth Circuit is in conflict with that of the Fourth and Tenth Circuits.[4] Petitioner is mistaken. In *Tennessee Consoli-*

---

[3] As the court of appeals pointed out, the determination that Williams did not have totally disabling pneumoconiosis in 1996 is "final and correct[] regardless of whether the DOL reviewed Dr. Lebovitz's diagnosis in adjudicating the claim." Pet. App. 14a.

[4] Petitioner also argues (Pet. 7, 10-11) that the decision in this case is in conflict with the Fourth Circuit's decision in *Island Creek Coal Co.* v. *Henline*, 456 F.3d 421 (2006). Conflicts within a circuit's law are not for this Court to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). Even so, there is no conflict. *Henline* addressed the

*dated Coal Co.* v. *Kirk*, 264 F.3d 602 (2001), the Sixth Circuit held that several prior reports relied upon by an employer seeking to foreclose a subsequent claim "failed to demonstrate that a diagnosis of total disability due to pneumoconiosis was made." *Id.* at 607. The statement petitioner cites—that "[m]edically supported claims, even if ultimately deemed 'premature' because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period," *id.* at 608—is dicta. The claim at issue in *Kirk* was not "[m]edically supported." *Id.* at 607. The Sixth Circuit has recognized as such in a subsequent unpublished decision. *Peabody Coal Co.* v. *Director, OWCP*, 48 Fed. Appx. 140, 147 (2002). In that case, the court reached the same result as the Fourth and Tenth Circuits: "[I]f a miner's claim is ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitation purposes." *Id.* at 146.

Finally, petitioner's interpretation of the statute of limitations would frustrate the Director's regulatory framework for considering subsequent claims and the purposes of the Black Lung Benefits Act. Petitioner rightly does not contend that the statute of limitations precludes subsequent claims. Cf. *Lisa Lee Mines*, 86 F.3d at 1363 n.9. But requiring miners to bring all claims within three years after their *first* diagnosis would bar most subsequent claims. The court of appeals' decision also is more consistent with the latent and progressive nature of pneumoconiosis because it

---

question whether a "medical determination" had to be in writing in order to trigger the statute of limitations, a question not presented in this case. 456 F.3d at 425.

prevents a misdiagnosis from foreclosing relief when a miner's symptoms develop at a later time. Contrary to petitioner's assertion (Pet. 14), the decision below does not render the statute of limitations "meaningless." A miner who receives a diagnosis of totally disabling pneumoconiosis and does nothing for more than three years will not be eligible for benefits.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*

JONATHAN L. SNARE
*Acting Solicitor of Labor*

NATHANIEL I. SPILLER
*Assistant Deputy Solicitor*

EDWARD D. SIEGER
*Attorney*
*Department of Labor*

FEBRUARY 2007

## APPENDIX

[Seal Omitted]

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
11870 Merchants Walk, Suite 204
Newport News, Va 23606
(757) 591-5140 (TEL)
(757) 591-5150 (FAX)

---

Case No.: 2002-BLA-05329

IN THE MATTER OF: BILLY D. WILLIAMS, CLAIMANT

*v.*

CONSOLIDATION COAL COMPANY, EMPLOYER,

AND

DIRECTOR, OFFICE WORKERS' COMPENSATION PROGRAMS, PARTY-IN-INTEREST

---

Issue Date: 16 Apr. 2004

---

**ORDER DENYING RENEWED MOTION FOR SUMMARY JUDGMENT AND SETTING A BRIEFING SCHEDULE**

Employer, Consolidation Coal Company, renews its motion for summary judgment first made at the hearing in the captioned case (Tr. 55-6). Employer bases its motion on the statute of limitations in 30 U.S.C. 932(f) and 20 C.F.R. 725.308, which require a miner to file a claim within three years following a medical determination of

his total disability due to pneumoconiosis. Exceptions can be made for good cause. *Id.*

The facts are not in dispute. Mr. Williams has twice filed Black Lung claims-on July 31, 1995 and June 11, 2001 (DE 1, 3). Claimant wrote to Claims Examiner Juliette DeMoss in December 2001 forwarding to her a November 9, 1995 medical report of Dr. Jerome J. Lebowitz, which report Claimant's attorney, Anthony Kovach, had forwarded to Claimant. Attorney Kovach had explained to Mr. Williams in 1995 that Dr. Lebowitz's report (DE1) definitely stated that Claimant had black lung disease and was totally disabled therefrom (Tr. 46-7). Employer contends that Claimant's learning about this letter (sometime in 1995) triggered the running of the statute of limitations both for Claimant's initial claim and his current or "duplicate" claim.

For the following reasons, I am denying Employer's motion:

1. The Department of Labor denied Mr. Williams' first claim after the issuance of Dr. Lebowitz' letter and after its contents were made known to Claimant. The court in *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502, 1507 (10th Cir. 1996) held that a final order by an Office of Workers' Compensation Program adjudicator that a claimant is not totally disabled due to pneumoconiosis "repudiates any earlier medical determination to the contrary and renders prior medical advice ineffective to trigger the running of the statute of limitations." Thus, under *Wyoming Fuel Co,* the Department of Labor's denial of Mr. Williams' first claim on January 11, 1996, nullified the communication by Dr. Lebowitz insofar as its ability to trigger the running of the statute of limitations is concerned.

2. I understand that there is contrary precedent in the Sixth Circuit. *See Kirk v. Consolidated Coal Co.*, 264 F.3d 602 (6th Cir. 2001). However, the persuasiveness of this precedent is lessened considerably by a subsequent unpublished decision to the contrary in the same circuit. *Peabody Coal Co. v. Director, OWCP (Dukes)*, No. 01-3043 (6th Cir. Oct. 2, 2002) (unpub.).

3. Employer seeks to distinguish *Wyoming Fuel Co.* from the present case in that, unlike in *Wyoming Fuel Co.*, the Department of Labor claims examiner here did not have the doctor's letter before it when it denied the claim. I regard this as a distinction without a significant difference because there is no showing that the Department of Labor would have reached a different result in the present case had it been informed of Dr. Lebowitz's opinion. Indeed, I take official notice of the fact that Dr. Lebowitz's opinion is unreasoned and undocumented and would almost certainly not have changed the Department of Labor's disposition of the claim.

4. At the time of Mr. Williams' filing his second claim, the law in effect as enunciated by the Benefits Review Board in *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990) was to the effect that the statute of limitations in 20 C.F.R. 725.308 did not apply to duplicate claims. Therefore, to rule in Employer's favor on this motion would be to retroactively apply present law concerning the effect of that regulation on duplicate claims. I decline to do so and find that justice does not require me to.

For the reasons stated above, Employer's renewed motion for summary judgment is DENIED. Because Employer has stated that it will not comply with my discovery order, there is no point in further delaying the

setting of a briefing schedule. Therefore, it is hereby ORDERED that briefs in the captioned case are due May 3, 2004.

/s/ FLETCHER E. CAMPBELL, JR.
FLETCHER E. CAMPBELL, JR.
Administrative Judge

FEC/Ipr
Newport News, Virginia